U.S. Department of Justice

Immigration and Naturalization Service

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Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: EAC 01 232 54637 Office: Vermont Service Center Date: JAN 14 2003

IN RE: Petitioner:
Beneficiary: [redacted]

Petition: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to § 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(3)

IN BEHALF OF PETITIONER: [redacted]

PUBLIC COPY

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a restaurant and seeks to employ the beneficiary permanently in the United States as a cook. As required by statute, the petition is accompanied by an individual labor certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the financial ability to pay the beneficiary the proffered wage as of the priority date of the visa petition.

On appeal, counsel submits additional evidence and reiterates the claim that the petitioner has the ability to pay the proffered wage.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary or seasonal nature, for which qualified workers are not available in the United States.

8 C.F.R. 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. Matter of Wing's Tea House, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the petition's priority date is January 14, 1998. The beneficiary's salary as stated on the labor certification is $18.89 per hour for 40 hours per week, which equals $39,291.20 per year.

Counsel initially submitted copies of the petitioner's 1997 and 1998 Short-Form 1120-A U.S. Corporate Income Tax Returns, and a copy of the petitioner's 1999 Form 1120 U.S. Corporate Income Tax Return. The 1997 return covered the tax year ending July 31, 1998, and indicated that during that tax year, the petitioner had gross receipts of $391,073, gross profit of $212,730.04, paid compensation of officers in the amount of $36,400 and salary and wages of $41,871. The petitioner's taxable income before net operating loss deduction and special deductions for that year was a loss of $9,309.16.

The 1998 return, for the tax year ending July 31, 1999, stated that the petitioner had gross receipts of $486,160, gross profit of $232,816.35, paid $32,200 in compensation to officers, paid salary and wages of $36,474, and had a taxable income before net operating loss deduction and special deductions of $10,959.65.

The director observed that this documentation contained insufficient evidence of the petitioner's ability to pay the proffered wage as of January 14, 1998, the date the request for labor certification was accepted for processing. On September 17, 2001, the director requested additional evidence to establish that the petitioner had the ability to pay the proffered wage as of January 14, 1998. Because the petitioner claimed to have employed the beneficiary since August 1997, the director also asked for the beneficiary's Federal Form W-2 Wage and Tax Statements for 1998 through 2000.

In response, counsel submitted a letter in which she stated that the beneficiary does not have a social security number. Counsel states that the petitioner therefore paid the beneficiary in cash and that no W-2 Wage and Tax Statements are available. Counsel also submitted additional copies of the tax returns already submitted and a copy of the petitioner's 2000 Form 1120 U.S. Corporate Income Tax Return. Further, counsel provided a letter from the owner of the petitioning company stating that he was the restaurant's previous cook. Further still, counsel provided a letter from a previous employer of the beneficiary, stating that the beneficiary worked for him as a cook.

Finally, counsel submitted a letter from a public accountant stating that he believed, "based on current and future trends," that the petitioner is able to hire and compensate an additional employee.

The director determined that the evidence submitted did not establish that, on January 14, 1998, the date the request for labor certification was accepted for processing, the petitioner had the

ability to pay the proffered wage. The director denied the petition accordingly.

On appeal, counsel reiterates that the beneficiary has been employed by the petitioner since August 1997 but that no W-2 Forms are available because the beneficiary was paid in cash. Counsel stated that the director disregarded the fact that the petitioning company is a going concern, and that the petitioner would not be in business if the business were not profitable. Counsel cited various figures from the tax returns submitted and stated that they demonstrate that the petitioner has the ability to pay the proffered salary.

Neither the petitioner nor counsel has submitted any evidence of the amount the beneficiary has received in compensation during his alleged employment for the petitioner.

As to the figures recited by counsel, we will restrict our discussion to figures from the petitioner's 1997 and 1998 returns, which bear information salient to the issue at hand, that is; whether the petitioner had the ability to pay the proffered wage on January 14, 1998, the date the request for labor certification was accepted for processing.

Counsel notes that the 1997 return shows a total income of $212,730, salaries of $41,871, and assets of $149,742. That return, however, also shows that the business suffered a net loss of $9,309.16 that same year. The tax return for that year does not demonstrate that the petitioner was able to pay the proffered salary of $39,291.20 out of the profits.

Similarly, counsel notes that the 1998 return shows that the petitioner had a total income of $232,816, paid salaries of $36,474, and had total assets of $157,569. That same return, however, shows that the corporation's taxable income for that year was $10,959.65. The return shows that the petitioner was unable during that year to pay the proffered salary out of its profits.

Counsel and the petitioner submitted insufficient evidence to establish that the petitioner had the ability to pay the proffered salary as of January 14, 1998.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.